

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION**

In re:

BKY 04-33308 GFK

*Charles M. Schrandt and
Beverly A. Schrandt,*

Debtors.

NOTICE OF RENEWED OBJECTION TO
CONFIRMATION OF PLAN AND
MOTION TO DISMISS

TO: All parties entitled to notice pursuant to LOCAL RULE 9013-3.

1. Jasmine Z. Keller, Standing Chapter 13 Trustee (the "Trustee"), by and through the undersigned counsel, moves the court for the relief requested below and gives notice of hearing herewith.

2. **NOTE: CONTESTED MATTERS ONLY THAT WERE ORIGINALLY SCHEDULED TO BE HEARD BEFORE CHIEF JUDGE KISHEL ON SEPTEMBER 23, 2004 ARE CONTINUED FOR HEARING TO OCTOBER 28, 2004.** A hearing on this motion will be held before the Honorable Gregory F. Kishel, Courtroom 228B, U.S. Courthouse, 316 North Robert Street, St. Paul, Minnesota, at 10:30 a.m. on October 28, 2004 or as soon thereafter as counsel may be heard.

3. Any response to this motion must be filed and delivered not later than 10:30 a.m. on October 27, 2004, which is 24 hours before the time set for hearing, or filed and served by mail not later than October 25, 2004, which is three business days before the hearing date. **UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.**

4. This court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 1334, FED. R. BANKR. P. 5005, and LOCAL RULE 1070-1. The proceeding is a core proceeding. The Chapter 13 petition was filed on June 3, 2004. The case is now pending in this court.

5. This motion arises under 11 U.S.C. §§ 1322 & 1325 and FED. R. BANKR. P. 3015 and LOCAL RULES 3015-1. Movant requests relief with respect to denial of confirmation of the Plan and for dismissal of the case.

6. The Debtors filed a Modified Chapter 13 Plan on August 13, 2004 (the "Plan") in response to the Trustee's objection filed July 20, 2004. As of August 13, 2004, the Debtors had paid \$972 to the Trustee as and for their July 2004 payment, and had begun to make their August 2004 payment. The Plan provides for payments of \$2,873 per month for 14 months for a total additional contribution of \$40,222. (The Plan's calculations in paragraph 1(b) are incorrect.) The Plan would allow for a distribution of approximately 30% on account of estimated

nonpriority unsecured claims in the amount of \$45,687, although the actual distribution is difficult to determine on account of the mathematical errors in the Plan.

7. Through the month of August 2004, the Debtors have paid the Trustee \$1,944 and are current in contributions to the original plan through August 2004.

8. The Debtors propose to increase their plan payments to \$2,873, which appears to address the Trustee's original objection that a number of their monthly expenses are excessive or unnecessary: \$400 for maintenance, although the Debtors reside in rental property; \$1,000 per month for food for the Debtors, with bi-weekly visits by their grandchild; \$1,200 for rent for their adult son; and, \$155 per month for repayment of their adult son's student loan or loans.

9. The Debtors now list a number of unsecured claims in paragraph 8 of the Plan. There is no apparent justification for separating these claims into a separate class and paying them in full. Such a classification unfairly discriminates in favor of these claims in violation of 11 U.S.C. § 1322(b)(1), and the Trustee objects to confirmation of the Plan on that basis.

10. The Trustee has not withdrawn her objection to confirmation on the grounds that the Plan does not devote all of the Debtors' projected disposable income to payments under the plan. 11 U.S.C. § 1325(b)(1), and renews that objection until such time as the issue is resolved. A debtor under chapter 13 should contribute all disposable income to the debtor's plan. *In re McDaniel*, 126 B.R. 782, 784 (Bankr. D. Minn. 1991). "Disposable income" includes all of a debtor's income which is "not reasonably necessary to be expended" by the debtor. 11 U.S.C. § 1325(b)(2). "Reasonably necessary to be expended" does not necessarily mean that such expenses should be sufficient to maintain the debtor's former lifestyle. *McDaniel*, 126 B.R. at 784.

11. The Trustee objects to confirmation of the Plan on the grounds that it does not provide for a minimum of 36 payments in violation of 11 U.S.C. § 1325(b)(1)(B). The Debtors have made two payments to the Trustee through August 2004. The Plan provides for no more than 14 additional payments. As such, the Debtors seek to obtain a discharge of their unsecured debts after making no more than 16 payments to the Chapter 13 Trustee. Even if the Plan increases the distribution to unsecured creditors, it still does not comply with the Statute.

12. The case has been continued from month to month to permit the Debtors to properly address the Trustee's objections. Further delay is prejudicial to the interests of creditors, and may constitute grounds for dismissal of the case.

13. If necessary, the Trustee reserves the right to call the Debtors and a member of her staff to testify as to the matters alleged in this motion.

WHEREFORE, the Trustee requests entry of an order as follows:

- a. Denying confirmation of the Debtors' Plan;
- b. Dismissing the Chapter 13 case; and,
- c. Granting such other and further relief the Court deems equitable and just.

Dated: September 14, 2004

Jasmine Z. Keller, Trustee

/e/ Margaret H. Culp
Thomas E. Johnson, #52000
Margaret H. Culp, #180609
Counsel to the Chapter 13 Trustee
12 South Sixth Street, Suite 310
Minneapolis, MN 55402
612-338-7591

VERIFICATION

I, Margaret H. Culp, an employee of Jasmine Z. Keller, the Standing Chapter 13 Trustee, declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Dated: September 14, 2004

/e/ Margaret H. Culp

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In re:

*Charles M. Schrandt and
Beverly A. Schrandt,*

Debtors.

BKY 04-33308 GFK

Chapter 13

**MEMORANDUM IN SUPPORT OF OBJECTION TO CONFIRMATION AND FOR
DISMISSAL OF CHAPTER 13 CASE**

FACTS

The facts supporting the Trustee's objection are summarized in the accompanying motion and will not be repeated here. The Trustee also relies on the representations made by the Debtors in their Schedules.

LEGAL DISCUSSION

1. Unfair discrimination.

Pursuant to 11 U.S.C. § 1322(b)(1), a debtor may designate a class of unsecured creditors, but may not discriminate unfairly against any class so designated. In this case, the Debtors appear to propose preferential treatment of certain members of the unsecured creditor class by providing for full payment to specific unsecured creditors in paragraph 8 of the Plan. Under the terms of the Plan, the remaining unsecured creditors will receive a pro rata distribution only after the designated unsecured claims are paid in full. Such treatment is presumptively unfair, and the Debtors bear the burden of proof to justify the discrimination as fair. See: In re Groves, 39 F.3d 212, 214 (8th Cir. 1994). In re Brooks, 274 B.R. 495, 497 (Bankr. E.D. TN 2002). There must be a reasonable rationale for such discrimination, and such discrimination must be proposed in good faith. In re Janssen, 220 B.R. 639 (Bankr. N.D. Iowa 1998). It is the Trustee's position that the Plan's proposed treatment is unfair, and objects to confirmation on that basis.

2. The Debtors' plan violates the "best efforts" test of 11 U.S.C. § 1325(b)(1)(B).

The Debtors' Plan only provides for 14 payments in addition to the two payments already made to the Trustee. The "best efforts" test requires that the Debtors provide that all of their disposable income to be received in the three-year period beginning on the date that the first

payment is due under the plan will be applied to payments under the plan. *11 U.S.C. § 1325(b)(1)(B)*. In this case, the Debtors propose to make a maximum of 16 payments, thereafter seeking a discharge of their unsecured debts. The Plan is in direct violation of the Statute and should not be confirmed.

For the reasons stated herein, the Trustee respectfully renews her request that confirmation of the Debtors' proposed Plan be denied, that the case be dismissed, and for such other relief as the Court determines just and equitable.

Respectfully submitted:

Dated: September 14, 2004

/e/ Margaret H. Culp

Thomas E. Johnson, ID #52000

Margaret H. Culp, ID #180609

Counsel for Chapter 13 Trustee

12 South Sixth Street, Suite 310

Minneapolis, MN 55402-1521

612-338-7591

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION**

In re:

BKY 04-33308 GFK

*Charles M. Schrandt and
Beverly A. Schrandt,*
Debtors.

UNSWORN DECLARATION
FOR PROOF OF SERVICE

The undersigned, an employee of Jasmine Z. Keller, Standing Chapter 13 Trustee, declares that on September 14, 2004, she served the following:

1. Notice and Objection to Confirmation of Plan and for Motion for Dismissal;
2. Memorandum of Facts and Law
3. Proposed order; and
4. Unsworn Declaration for Proof of Service

on each of the entities named below as follows:

By electronic means only:

U.S. Trustee
612-664-5516

Lloyd S. Myster, Esq.
763-416-0065

By United States Mail, postage pre-paid:

Lloyd S. Myster, Esq.
701 Fourth Avenue South, Suite 500
Minneapolis, MN 55415

Charles A. Schrandt
Beverly A. Schrandt
1628 Fourth Street North
South St. Paul, MN 55075

And, I declare under penalty of perjury that the foregoing is true and correct.

Dated: September 14, 2004

/e/ Margaret H. Culp
Margaret H. Culp

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION**

In re:

BKY 04-33308 GFK

*Charles M. Schrandt and
Beverly A. Schrandt,*

Chapter 13

Debtors.

ORDER

At St. Paul, Minnesota _____.

This matter came before the Court on the Chapter 13 Trustee's Objection to Confirmation of Plan and Motion to Dismiss. Appearances were noted on the record. Based on the files, the proceedings, and record herein,

IT IS ORDERED:

1. The Trustee's Objection to Confirmation is **SUSTAINED**.
2. Confirmation of the Debtors' Plan is **DENIED**.
3. The Chapter 13 case is **DISMISSED**.

Honorable Gregory F. Kishel
Chief United States Bankruptcy Judge